09-0876

No. 10-___

IN THE

Supreme Court of the United States

DONALD BULLCOMING,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent.

On Petition for a Writ of Certiorari
to the New Mexico Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Confrontation Clause permits the prosecution to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Donald Bullcoming respectfully petitions for a writ of certiorari to the New Mexico Supreme Court in *State v. Bullcoming*, No. 31,186 CR-05-937.

OPINIONS BELOW

The opinion of the New Mexico Supreme Court is published at 147 N.M. 487, 226 P.3d 1 (2010). The opinion of the New Mexico Court of Appeals is published at 144 N.M. 546, 189 P.3d 679 (Ct. App. 2008). The trial court's Judgment and Sentence is not published.

JURISDICTION

The opinion of the New Mexico Supreme Court was entered on February 12, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

STATEMENT OF THE CASE

This Court held in *Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527 (2009), that the prosecution violates the Confrontation Clause when it introduces forensic laboratory reports into evidence without affording the accused an opportunity to "'be confronted with' the analysts at trial." *Id.* at 2532 (quoting *Crawford v. Washington,* 541 U.S. 36, 54 (2004)). *State v. Bullcoming* raises the question of whether the prosecution complies with that holding by introducing forensic reports through the in-court testimony of someone, such as a supervisor, who did not perform or observe the testing discussed in the reports. In this case, the New Mexico Supreme Court upheld the practice.

This same question is raised in *Pendergrass v. Indiana,* 913 N.E.2d 703 (Ind. 2009), Supreme Court Docket No. 09-866 (Petition for Writ of Certiorari filed in this Court on Feb. 22, 2010).

1. At 4:24 p.m., when Mr. Bullcoming was driving his brother's truck, he bumped the back of another truck at a stop sign. There was only extremely slight damage to the other vehicle, and no damage to his truck. When this happened, he exchanged insurance information with Dennis Jackson, the other driver. Jackson noticed that Mr. Bullcoming smelled of alcohol and that his eyes were bloodshot.

Mr. Bullcoming walked away (left his passengers and the truck) when Jackson told him that the police had been called.

According to Mr. Jackson, shortly after an officer arrived at the scene, Mr. Bullcoming was returned to the accident scene in another patrol car. Mr. Jackson admitted he was not timing the events that day and that "time means nothing." He did notice, however, that due to the minor accident, he was fifty (50) minutes late meeting his family in Durango, Colorado.

Mr. Bullcoming testified that he was *not* drunk when he was driving. There may have been an odor of alcohol in the car he said, but the odor was not from him. He said that he left the accident scene before the police arrived because he had a warrant out for his arrest in Oklahoma. He said that he walked across the street going north, and went down a hill where there was a creek and trees. He met up with some Native American men, and he drank heavily with them—they finished off a half-gallon of vodka. When the officer on the motorcycle found him, it was about forty-five minutes after the accident.

Mr. Bullcoming was given his field sobriety tests when he was brought back to the scene in a patrol car, which he failed, and a blood alcohol test, two hours after the point in time when he was driving. At 6:35 p.m., when his blood alcohol was tested, it was .21. (*See Appendix D*: State's Exhibit 1--Report of Blood Alcohol Analysis).

2. The State charged petitioner with one count of aggravated Driving While Intoxicated (DWI), a fourth degree felony, contrary to NMSA 1978, Section 66-8-102 (2005, prior to amendments through 2008). Petitioner denied the charge and sought to prove that he drank after he was driving.

The day before the trial defense counsel filed a written motion to exclude State's witnesses because she had only been notified that morning by facsimile that the State intended to call three new witnesses: 1) Dennis Jackson, 2) a blood analyst, and 3) the nurse who withdrew Mr. Bullcoming's blood. Defense counsel believed the State was only going to call the three officers that were listed in the State's Notice of Disclosure filed 10/27/05. The court refused to exclude the witnesses who were disclosed that day, but offered her a continuance to interview them. Mr. Bullcoming chose to go to trial the next day.

Defense counsel again moved to exclude the testimony of the blood analyst at trial the next day, stating that she had made her record the day before about the late disclosure of this witness. Defense counsel also objected to the blood analysis evidence because the analyst who performed the test was not at trial to testify about the test. Defense counsel argued that she did not want another analyst to testify about the test, and about a report he had not prepared, because it would violate Mr. Bullcoming's constitutional right to confrontation. The court found that the lab result of Mr. Bullcoming's blood/alcohol test was a business record that

was not prohibited by *Crawford v. Washington,* 541 U.S. 36 (2004).

Defense counsel disagreed with the court and countered that it was a "business record prepared in anticipation of litigation." Counsel added that she did not know that the analyst who had performed the test was not available. If she had known this, she said, her defense would have been different.

The witness, Gerasimos Razatos, testified that he is an analyst and that he helps to oversee the breath and blood alcohol programs for the New Mexico Department of Health Scientific Laboratory Division, Toxicology Bureau. He stated that the analyst who had performed the test was on unpaid leave. Razatos did not perform the test in this case, nor was he the "reviewer" on the report. *See Appendix D:* State's Exhibit 1.

When Razatos testified about Mr. Bullcoming's blood analysis, defense counsel objected again to the admission of the report and to his testimony. Over objection, he testified about the lab's standard operating procedures and, based on the written report, he discussed the chain of custody in this case. When the witness was asked about alcohol metabolism and whether he had expertise in that area, defense counsel objected again. The witness stated his opinion that a blood test and a breath test were equally accurate. Based on the other analyst's report, the witness stated that Mr. Bullcoming had .21 grams of alcohol per one hundred milliliters of blood in his system at 6:25 p.m. The jury convicted petitioner of

aggravated DWI. The trial court sentenced him to two years in prison.

3. The New Mexico Court of Appeals affirmed. It upheld the trial court's ruling that the forensic report was a business record that was not prohibited by *Crawford v. Washington,* 536 U.S. 36 (2004). It decided that a blood alcohol report is admissible as a public record and that it presented no issue under the Confrontation Clause because the report was non-testimonial.

4. The New Mexico Supreme Court granted discretionary certiorari review. While the case was pending, this Court issued its decision in *Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527 (2009), clarifying that forensic laboratory reports are testimonial under *Crawford.* Eight months later, the New Mexico Supreme Court held that the blood alcohol report was testimonial evidence, but it was admissible even though the forensic analyst who performed the test did not testify.

Relying on the rule that "the Confrontation Clause permits the admission of testimonial evidence so long as *'the declarant* is present at trial to defend or explain it,' ¶ 19 (quoting *Crawford v. Washington,* 541 U.S. 36, 59 n.9 (2004) (emphasis added)), the New Mexico Supreme Court held that the prosecution's surrogate forensic testimony satisfied the Clause. *State v. Bullcoming*, 147 N.M. 487, 226 P.3d 1 (2010). In the New Mexico Supreme Court's view, the prosecution may introduce a forensic report authored by a nontestifying analyst so long as a different "qualified" forensic witness is "available for cross-examination"

regarding the operation of the forensic machine at issue, the laboratory's procedures, and the results reported in the forensic report.

According the New Mexico Supreme Court, the supervisor who had no involvement in the specific test could testify because the analyst who prepared the blood alcohol report was a mere scrivener and Petitioner's true accuser was the gas chromatograph machine which detected the presence of alcohol in Petitioner's blood, accessed Petitioners BAC level, and generated a computer print-out listing its results. *Bullcoming*, ¶¶ 19-20.

REASONS FOR GRANTING THE WRIT

State high courts and federal courts of appeals are deeply and intractably divided over whether the Confrontation Clause, as explicated in *Crawford v. Washington,* 536 U.S. 36 (2004), and *Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527 (2009), allows the government to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of another forensic analyst who did not perform or observe the laboratory analysis described in the statements. This Court should use this case to resolve this escalating conflict. Forensic evidence plays a central role in many criminal prosecutions. Allowing surrogate analyst testimony prevents scrutiny of the actual analyst's "honesty, proficiency, and methodology," *Melendez-Diaz,* 129 S. Ct. at 2538, in the form guaranteed by the

Sixth Amendment: live testimony in front of the accused and the trier of fact, with an opportunity for cross-examination. As such, the New Mexico Supreme Court's holding below – that the Confrontation Clause was satisfied by allowing the defendant to cross-examine someone other than the author of the report the prosecution introduced – is incorrect.

I. The New Mexico Supreme Court's Decision Deepens The Conflict Over The Question Presented.

In *Crawford v. Washington,* 541 U.S. 36 (2004), this Court held that the prosecution may not introduce "testimonial" hearsay against a criminal defendant unless the defendant has an opportunity to cross-examine the declarant, or unless the declarant is unavailable and the defendant has (or had) an opportunity for cross-examination. *Id.* at 54, 68. Five years later, in *Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527 (2009), this Court clarified that forensic laboratory reports are testimonial evidence. *Id.* at 2532. Accordingly, this Court held that the prosecution violates the Confrontation Clause when it introduces a nontestifying analyst's forensic laboratory report through the testimony of a police officer.

This Court further indicated that two important, but distinct, questions concerning forensic evidence must be resolved to implement *Melendez-Diaz.* The

first is whether a state satisfies the Confrontation Clause if it requires defendants to do more than simply demand that the prosecution put an analyst on the stand in order to introduce the contents of a forensic report. *See Melendez-Diaz,* 129 S. Ct. at 2541 n.12. When this Court decided *Melendez-Diaz,* one case touching on this issue was pending on a petition for a writ of certiorari, *Briscoe v. Virginia,* 657 S.E.2d 113 (Va. 2008), *cert. granted,* 129 S. Ct. 2858. This Court immediately granted the petition and is hearing the case this Term.

The second issue concerns whether the prosecution satisfies the Confrontation Clause whenever it calls *some* forensic analyst to the stand. *See Melendez-Diaz,* 129 S. Ct. at 2532 n.1; *id.* at 2444-46 (Kennedy, J., dissenting). When this Court decided *Melendez-Diaz,* several cases touching on this issue – that is, cases in which the courts found no confrontation violations at least in part because the prosecution had called at least some forensic expert to the stand – were pending on petitions for writs of certiorari.

The cases fell into three categories. First, some cases involved scenarios in which the prosecution introduced forensic reports while an analyst was on the stand, but those reports were simply machine print-outs and thus were nontestimonial. *See United States v. Washington,* 498 F.3d 225 (4th Cir. 2007) (Supreme Court docket No. 07-829 1); *Blaylock v. Texas,* 259 S.W.3d 202 (Tex. Ct. App. 2008) (No. 08-8259). Second, one case involved a scenario in which a

laboratory supervisor testified based in part on someone else's forensic reports, but the supervisor never repeated anything in the reports and the prosecution never introduced them into evidence; instead, the supervisor limited himself to stating his own conclusions without revealing their underlying basis. *State v. O'Maley,* 932 A.2d 1 (N.H. 2007) (No. 07-7577). Third, some cases involved scenarios in which the prosecution introduced nontestifying analysts' forensic reports through the in-court testimony of a different forensic analyst. *People v. Barba,* 2007 WL 4125230 (Cal. Ct. App. Dec. 21, 2007) (unpublished) (No. 07-11094); *State v. Crager,* 879 N.E. 2d 745 (Ohio 2007) (No. 07- 10191).

This Court denied certiorari in the first two categories of cases, leaving in place their holdings that the Confrontation Clause had not been violated.[1] But this Court granted, vacated, and remanded the two cases in the third category – the cases that had held that the prosecution could introduce one forensic analyst's testimonial statements through the in-court testimony of another.[2] A split among state supreme courts and a federal court of appeals has quickly developed

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[1] *See Washington v. United States,* 129 S. Ct. 2856 (2009); *Blaylock v. Texas,* 129 S. Ct. 2861 (2009); *O'Maley v. New Hampshire,* 129 S. Ct. 2856 (2009).

[2] *See Barba v. California,* 129 S. Ct. 2857 (2009); *Crager v. Ohio,* 129 S. Ct. 2856 (2009). This Court denied certiorari in one other case involving this fact pattern: *People v. Geier,* 161 P.3d 104 (Cal. 2007), *cert. denied,* 129 S. Ct. 2856 (2009) (No. 07-7770). However, the California Supreme Court had held that even if a Confrontation Clause violation had occurred, any error was harmless. *Geier,* 161 P.3d. at 140.

concerning this issue, which in fact deepens a preexisting conflict on the question. That is the issue this case presents.

1. In the wake of *Melendez-Diaz,* two state supreme courts and two federal courts of appeals have held that the Confrontation Clause prohibits what might be called "surrogate" forensic testimony – that is, introducing one forensic analyst's testimonial statement through the in-court testimony of another. In *Commonwealth v. Avila,* 912 N.E.2d 1014 (Mass. 2009), the defendant argued that the prosecution violated the Confrontation Clause by permitting one forensic analyst "to recite [another's] findings and conclusions on direct examination." *Id.* at 1027. Drawing on its earlier decision in *Commonwealth v. Nardi,* 893 N.E.2d 1221 (Mass. 2008), which had held that a testifying analyst in such a scenario is "plainly . . . asserting the truth of" the nontestifying analyst's findings in a manner that triggers the defendant's constitutional right to confrontation, *id.* at 1232-33, the court held that *Melendez-Diaz* and *Crawford* require a testifying "expert witness's testimony [to be] confined to his or her own opinions." *Avila,* 912 N.E.2d at 1029. When a forensic examiner, "as an expert witness . . . recite[s] or otherwise testif[ies on direct examination] about the underlying factual findings of [an] unavailable [forensic analyst] as contained in [his forensic] report," the prosecution transgresses the Confrontation Clause. *Id.* at 1029.

Similarly, in *State v. Locklear,* 681 S.E.2d 293, 304-305 (N.C. 2009), the prosecution introduced two forensic analysts' reports through the in-court testimony of a third analyst. Reciting *Crawford*'s basic rule that "[t]he Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless *the declarant* is unavailable to testify and the accused has had a prior opportunity to cross-examine *the declarant,"* the North Carolina Supreme Court held that introducing one forensic analyst's report through the live testimony of a different analyst "violate[s a] defendant's constitutional right to confront the witnesses against him." *Id.* at 304-05 (emphasis added); *see also State v. Galindo,* 683 S.E.2d 785 (N.C. Ct. App. 2009) (finding confrontation violation where supervisor testified concerning someone else's forensic analysis).

The Seventh Circuit likewise has held that although a surrogate forensic analyst may testify based on raw data someone else generated, the "conclusions" of the nontestifying analyst who performed the testing are testimonial statements that must be "kept out of evidence." *United States v. Moon,* 512 F.3d 359, 362 (7th Cir.), *cert. denied,* 129 S. Ct. 40 (2008). Reaffirming that ruling in a case after *Melendez-Diaz,* the Seventh Circuit held that a forensic analyst's testimony based on forensic tests that another analyst performed did not violate the Confrontation Clause because "[the second analyst's] report was not admitted into evidence." *United*

States v. Turner, ___ F.3d ___, 2010 WL 92489, at *5 (7th Cir. Jan. 12, 2010). The Confrontation Clause would have been violated if the testifying analyst had "not [been] involved in the testing process" at issue and the prosecution had introduced the second analyst's certificate of analysis. *Id.* at *4-*5.

In *United States v. Martinez-Rios*, 595 F.3d 581 (5th Cir. 2010), the prosecution introduced a certificate asserting that the defendant had never received written permission to enter the United States. Instead of putting the person who authored the certificate on the stand, the prosecution presented live testimony from a different "records analyst," who had reviewed the file and who explained on the stand "how [the kind of certificate at issue] is ordinarily prepared." *Id.* at *4. The Fifth Circuit held that such surrogate testimony violated the Confrontation Clause, reasoning that the defendant was "unable to cross-examine the person who had prepared a testimonial statement to be used against him at trial." *Id.*

Intermediate courts in three large states – Texas, Michigan, and California – have likewise held that surrogate forensic testimony violates the Confrontation Clause. *See People v. Payne,* 774 N.W.2d 714 (Mich. Ct. App. 2009); *Wood v. State,* 299 S.W.3d 200 (Tex. Ct. App. 2009); *Hamilton v. State,* 300 S.W.3d 14 (Tex. Ct. App. 2009); *People v. Cuadros-Fernandez,* ___ S.W.3d ____, 2009 WL 2647890 (Tex. Ct. App. Aug. 28, 2009); *People v. Dungo,* 98 Cal. Rptr. 3d 702 (Cal. Ct. App. 2009), *rev. granted*

(Cal. Dec. 2, 2009); *People v. Lopez,* 98 Cal. Rptr. 3d 825 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009).[3] Moreover, while the Michigan Supreme Court has not ruled on the issue, it has denied review in a case holding that surrogate forensic testimony violated the Confrontation Clause and has vacated and remanded three decisions that condoned such testimony. *Compare People v. Horton,* 2007 WL 2446482 (Mich. Ct. App. 2007), *rev. denied,* 772 N.W.2d 46 (Mich. 2009), *with People v. Raby,* 2009 WL 839109 (Mich. Ct. App. 2009), *vacated and remanded,* 775 N.W.2d 144 (Mich. 2009); *People v. Dendel,* 2008 WL 4180292 (Mich. Ct. App. 2008), *vacated and remanded,* 773 N.W.2d 16 (Mich. 2009); *and People v. Lewis,* 2008 WL 1733718 (Mich. Ct. App. Apr. 15, 2008), *vacated and remanded,* 772 N.W.2d 47 (Mich. 2009). These post-*Melendez-Diaz* orders strongly suggest that the Michigan Supreme Court views the practice of surrogate forensic testimony as

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[3] Two reported California Court of Appeals opinions have reached a contrary result, reasoning that the California Supreme Court's pre-*Melendez-Diaz* decision in *People v. Geier,* 161 P.3d 104 (Cal. 2007), *cert. denied,* 129 S. Ct. 2856 (2009), dictates that "contemporaneously created" forensic reports are not testimonial and that surrogate forensic testimony does not violate the Confrontation Clause. *See People v. Rutterschmidt,* 98 Cal. Rptr. 3d 390, 411-12 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009); *People v. Gutierrez,* 99 Cal Rptr. 3d 369 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009); *accord People v. Bingley,* 2009 WL 3595261 (Cal. Ct. App. Nov. 3, 2009). As explained *supra* in footnote 2, however, this Court's denial of certiorari in *Geier* is readily explainable by the California Supreme Court's alternative harmless-error holding. Indeed, the State of California itself conceded in *Dungo* that "the reasoning in *Melendez-Diaz* undermines some of the rationale of *People v. Geier,*" and the State withdrew its "argument that the autopsy report [was] not testimonial because it constitutes a 'contemporaneous recordation of observable events.'" 98 Cal. Rptr. 3d at 711 n.11 (quoting state's supplemental letter brief).

untenable.

2. In direct contrast, three state high courts have held that introducing one forensic analyst's testimonial statement through the in-court testimony of another forensic analyst does not violate the Confrontation Clause.

a. Two state supreme courts have reasoned that surrogate forensic testimony satisfies the Confrontation Clause because it gives defendants the opportunity to cross-examine someone who is generally knowledgeable about the analyses involved, even if not the analyst who authored the forensic reports the prosecution seeks to introduce. In this case, the New Mexico Supreme Court followed this theory. At least when the live witness the prosecution chooses is familiar with the laboratory procedures and the operation of the gas chromatograph machine, in the New Mexico Supreme Court's view, the admission of the report by a non-testifying analyst does not violate the Confrontation Clause. ¶ 20.

The Georgia Supreme Court has also adopted the "good enough to suffice" rationale. *See Rector v. State,* 681 S.E.2d 157 (Ga. 2009). So long as a forensic analyst whom the prosecution puts on the stand has "reviewed the data and testing procedures to determine the accuracy" of another analyst's report, the testifying analyst may tell the jury the absent analyst's conclusions and say that he endorses them. *Id.* at 160.

The opinion of the Indiana Supreme Court in *Pendergrass v. Indiana,* 913 N.E.2d 703 (Ind. 2009), *petition for cert. filed* (U.S. Feb. 22, 2010) (No. 09-866), held that at least when the live witness the prosecution chooses is familiar with the laboratory as well as with the analyst who authored the report at issue, that surrogate supervisor witness "suffice[s] for Sixth Amendment purposes." *Id.* at 708. In *Pendergrass*, over petitioner's continuing objection, the supervisor testified concerning a DNA analyst's laboratory reports. The supervisor explained that as the police laboratory's supervisor, she had reviewed and initialed the actual analyst's work. But the supervisor's testimony concerning the DNA analysis consisted solely of repeating the actual analysts' assertions made in the reports themselves.

b. The Illinois Supreme Court has held that forensic analysts, as expert witnesses, can repeat testimonial statements of nontestifying analysts on the theory that such statements, even when the sole basis for the experts' opinions, are not offered for the truth of the matter asserted. *People v. Lovejoy*, 919 N.E.2d 843 (Ill. 2009). In *Lovejoy,* a medical examiner testified that another toxicologist detected six different types of drugs in the victim's body after conducting blood tests, indicating that poisoning caused the victim's death. *Id.* at 866-868. Relying on footnote nine in *Crawford,* which reaffirmed that the Confrontation Clause is not implicated

when out-of-court statements are introduced for reasons other than establishing the truth of the matter asserted, the Illinois Supreme Court held that the medical examiner's testimony repeating the nontestifying analyst's conclusions was not admitted for its truth but rather was introduced "to show the jury the steps [the examiner] took prior to rendering an expert opinion in th[e] case." *Id.* at 867-868 (citing *Crawford,* 541 U.S. at 59 n.9).[4]

3. The post-*Melendez-Diaz* conflict concerning surrogate forensic testimony deepens a pre-existing split over whether, as a more general matter, testimonial statements of a nontestifying witness can be introduced through the in-court testimony of an expert witness.

The Second Circuit, three state supreme courts, and the District of Columbia's highest court have held that introducing the testimonial statements of a nontestifying witness through the in-court testimony of an expert witness violates the Confrontation Clause. *See United States v. Mejia,* 545 F.3d 179 (2d Cir. 2008) (admission of testimonial statements through the in-court testimony of a

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[4] Footnote nine in *Crawford* referenced *Tennessee v. Street,* 471 U.S. 409 (1985), reaffirming that the Confrontation Clause is not implicated when the prosecution offers hearsay (even testimonial hearsay) for a purpose other than establishing the truth of the matter asserted. In *Street,* the defendant argued that his confession was false because the police had simply given him the confession of his alleged accomplice and told him to repeat it. *Id.* at 411-12. The prosecution countered by introducing the nontestifying accomplice's confession to show that it differed in material ways from the defendant's. Because the accomplice's confession was not offered for its truth, this did not violate the Confrontation Clause. *Id.* at 417.

gang expert); *Roberts v. United States,* 916 A.2d 922 (D.C. 2007) (admission of forensic laboratory reports through DNA expert's testimony); *State v. Johnson,* 982 So. 2d 672 (Fla. 2008) (admission of lab report through supervisor's testimony); *State v. Mangos,* 957 A.2d 89 (Me. 2008) (admission of statements concerning creation of DNA swabs through supervisor); *People v. Goldstein,* 843 N.E.2d 727 (N.Y. 2005) (admission of testimonial statements through psychologist's testimony), *cert. denied,* 547 U.S. 1159 (2006).[5]

In contrast, in *State v. Tucker,* 160 P.3d 177 (Ariz. 2007), *cert. denied,* 552 U.S. 923 (2007), a prosecutorial expert witness (a "materials expert") repeated statements on the stand that another, nontestifying expert had told him in an investigatory interview.[6] The Arizona Supreme Court did not dispute that the nontestifying expert's statements were testimonial. But the court refused to find a *Crawford* violation, reasoning that "a testifying expert witness may, for the limited purpose of showing the basis of his or her opinion, reveal the substance of a non-testifying expert's statements." *Id.* at 193. "Such statements do not violate

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[5] The Fourth Circuit, in an opinion by Judge Wilkinson, recently agreed with the Second Circuit's *Mejia* decision, explaining that "[a]llowing a [prosecution] witness simply to parrot out-of-court testimonial statements . . . directly to the jury in the guise of an expert opinion would provide an end run around *Crawford.*" *United States v. Johnson,* 587 F.3d 625, 635 (4th Cir. 2009). But the Fourth Circuit held that the Confrontation Clause was not violated in the case it was considering because the expert did not repeat or refer to any testimonial statements to the jury.

[6] The petition for certiorari in *Tucker* did not raise this Confrontation Clause issue.

the Confrontation Clause," the court continued, "because they are not admissible for their truth." *Id.*

The Arizona Court of Appeals has applied *Tucker* following *Melendez-Diaz* to hold that the prosecution may present an expert forensic analyst to testify concerning the results of tests performed by others. *State v. Gomez,* 2009 WL 3526649, at *4-5 (Ariz. Ct. App. Oct. 29, 2009).

4. Although *Melendez-Diaz* is a recent decision, this conflict over surrogate testimony is now firmly entrenched and ripe for resolution. The split among state high courts and the federal courts of appeals now stands at nine-to-five. There is no prospect that this split will resolve itself, nor any reason to believe that further percolation or anything this Court says in its forthcoming *Briscoe* decision will reveal any new arguments or considerations relevant to the dispute.[7]

II. This Issue Is Important To The Proper Administration Of Criminal Trials.

This Court should not allow the conflict over surrogate witnesses to persist.

1. The question presented implicates practices in several states across the country. Crime laboratory analyses play a central evidentiary role in a

[7] Of course, if this Court, out of an abundance of caution, wishes to hold this case pending the outcome in *Briscoe,* petitioner would have not objection to that.

large number of criminal trials, and prosecutors in numerous jurisdictions rely on surrogate witnesses to present the analysis of nontestifying analysts. Prosecutors, defense lawyers, and judges need to know as soon as possible whether surrogate testimony satisfies the Confrontation Clause.

2. The question presented also directly implicates the truth-seeking function of trial. As this Court noted in *Melendez-Diaz,* forensic reports, just like other *ex parte* testimony created by law enforcement agents, presents "risks of manipulation." 129 S. Ct. at 2536. Indeed, investigative boards, journalists, and interest groups have documented numerous recent instances of fraud and dishonesty in our nation's forensic laboratories. *Id.* at 2536-38.[8] This Court also has recognized that "a forensic analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution." *Melendez-Diaz,* 129 S. Ct. at 2536. Even an entirely honest and objective forensic analyst may suffer from a "lack of proper training or deficiency in judgment," *id.* at 2537, or may place undue analytical weight on a suspect methodology, *id.* at 2538. Surrogate witnesses fail to address – and may actually aggravate – the problems posed by an analyst's

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[8] For the most recent such example, see Jeremy W. Peters, *Report Condemns Police Lab Oversight,* N.Y. Times, Dec. 18, 2009 (describing "pervasively shoddy forensics work," as well as routinely "falsified test results," over a fifteen year period in the New York State crime laboratory).

potential fraud, incompetence, or flawed methodology. A recent case from California vividly illustrates the point. In *People v. Dungo,* 98 Cal. Rptr. 3d 702 (Cal. Ct. App. 2009), *rev. granted* (Cal.8 Dec. 2, 2009) the prosecution introduced an autopsy report to prove that a certain amount of time had elapsed before the victim's death, a hotly contested issue at trial. The medical examiner who had authored the report, however, had since been fired. He had also been forced to resign "under a cloud" from another job, and was blacklisted by law enforcement in two more counties for falsifying his credentials. *Id.* at 704. Finally, the examiner had been known to base his conclusions on police reports instead of forensic methods. *See People v. Beeler,* 891 P.2d 153, 168 (Cal. 1995); Scott Smith, *S.J.Pathologist Under Fire Over Questionable Past,* THE RECORD, Jan. 7, 2007, @ http://www.recordnet.com/apps/pbcs.dll/article?AID=/20070107/A_NEWS/70070311#STS=g329z7h5. 134t.

In light of this problematic track record, the prosecution in *Dungo* put the medical examiner's supervisor on the stand instead of the examiner. As the supervisor explained during the preliminary hearing, "[t]he only reason they won't use [the examiner himself] is because the law requires the District Attorney to provide this background information to each defense attorney for each case, and [the prosecutors] feel it becomes too awkward to make them easily try their cases." *Dungo,* 98 Cal. Rptr. 3d at 708 (alterations in original). The California Court of

Appeals held that this surrogate testimony violated *Crawford,* observing that the "prosecution's intent" had been to "prevent[] the defense from exploring the possibility that the [medical examiner] lacked proper training or had poor judgment or from testing [his] 'honesty, proficiency, and methodology.'" *Id.* at 714 (quoting *Melendez-Diaz,* 129 S. Ct. at 2538).

Even in cases seemingly involving less dramatic facts, allowing surrogate testimony would effectively insulate forensic analysts' work from scrutiny. In the field of ballistics and toolmark analysis, even good faith forensic conclusions "involve subjective qualitative judgments by examiners, and [] the accuracy of the examiners' assessments is highly dependent on their skill and training." *United States v. Taylor,* 633 F. Supp. 2d 1170, 1177-1178 (D.N.M. 2009) (quoting Committee on Identifying the Needs of the Forensic Sciences Community; Committee on Applied and Theoretical Statistics, National Research Council, *Strengthening Forensic Sciences in the United States: A Path Forward,* 5-20 (2009). Yet there is little hope for defense counsel to find out through questioning supervisors which ballistics and toolmark reports are faulty; only questioning the analysts who authored incriminating reports can reveal whether the analysts actually understand the science at issue and whether they exercised appropriate care and followed necessary protocols in reaching their conclusions.

III. This Case Is An Excellent Vehicle For Considering The Question Presented.

This case presents an excellent vehicle for resolving the split of authority over the question presented.

1. This case raises the question presented free from any waiver or collateral review complications. It comes to this Court on direct review, and petitioner clearly and unambiguously objected at trial, arguing that the introduction of the forensic report through the testimony of a witness other than the one who authored the report violated the Confrontation Clause. Petitioner also preserved this issue by contending at each level of the New Mexico appellate courts that the admission of the analyst's reports violated the Sixth Amendment. Finally, the New Mexico courts resolved this issue on the merits.

2. This case clearly and cleanly presents the question of whether the prosecution may introduce one forensic analyst's testimonial statements through the testimony of a different forensic analyst. The forensic report at issue is unquestionably testimonial under *Melendez-Diaz,* and the statements in the report were unquestionably relayed to the jury. In fact, the prosecution introduced the report directly into evidence. Moreover, the shortcomings of using a surrogate witness were perfectly encompassed because the supervisor did not review the actual analyst's underlying

data, nor was he the reviewer of the report. *See Appendix D.*

3. Finally, the forensic report at issue played a central role at trial. If this Court concludes that petitioner's confrontation rights were violated, he would be entitled to a new trial.[9]

IV. The New Mexico Supreme Court's Decision Is Incorrect.

1. The New Mexico Supreme Court erred in holding that the government may introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of another forensic analyst. The Sixth Amendment guarantees a defendant the right "to be confronted with *the* witnesses against him." U.S. Const. amend VI. The use of the definite article in this constitutional provision is not adventitious. Instead, it dictates that if the State decides to introduce testimonial evidence, it must afford the defendant the opportunity be confronted with the specific creator of that evidence – that is, the person who actually made the statement or authored the document at issue. *Crawford v.*

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[9] The State may argue that the admission of the report was harmless error. An assessment of "whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of" cannot establish harmless error. *Fahy v. Connecticut,* 375 U.S. 85, 86 (1963); *see also United States v. Lane,* 474 U.S. 438, 450 n.13 (1986) ("[T]he harmless-error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry.") (internal quotation marks and citation omitted). Rather, "the government must demonstrate beyond a reasonable doubt that the tainted evidence did not contribute to the conviction." *United States v. Alvarado-Valdez,* 521 F.3d 337, 342 (5th Cir. 2008); *accord Fields v. United States,* 952 A.2d 859, 867-68 (D.C. 2008); *see generally Chapman v. California,* 386 U.S. 18 (1967). (emphasis added).

Washington, 541 U.S. 36, 68 (2004). Accordingly, this Court has repeatedly held that the government violates the Confrontation Clause if it introduces a witness's testimonial statements through the in-court testimony of a different person, such as a police officer. *See id.; Davis v. Washington,* 547 U.S. 813 (2006); *Melendez-Diaz,* 129 S. Ct. at 2532; *id.* at 2546 (Kennedy, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second . . . .").

Nothing about the status of an in-court witness as a forensic supervisor or similar type of person alters this analysis. It is true that a supervisor may be a competent witness to answer general questions regarding someone else's forensic declarations, such as systemic problems with the laboratory processes that the person used. But the Confrontation Clause guarantees more than that. As this Court explained in *Melendez-Diaz,* the Clause guarantees an opportunity to test the "honesty, proficiency, and methodology" of the actual author of a forensic report that the prosecution seeks to introduce into evidence. 129 S. Ct. at 2538. Indeed, an analyst "who provides false results may, under oath in open court, reconsider his false testimony. And, of course, the prospect of confrontation will deter fraudulent analysis" and "weed out . . . incompetent [analysts] as well." *Id.* at 2537

(citations omitted).

The holding of *Melendez-Diaz,* in fact, effectively resolves the question presented here. There, this Court explained that "[a] witness's testimony against a defendant is . . . inadmissible unless *the witness* appears at trial or, if *the witness* is unavailable, the defendant had a prior opportunity for cross-examination." 129 S. Ct. at 2531 (emphasis added); *see also id.* at 2532 ("petitioner was entitled to 'be confronted with' *the analysts* at trial") (emphasis added); *id.* at 2537 n.6 ("The analysts who swore the affidavits provided testimony against Melendez-Diaz, and *they* are therefore subject to confrontation . . . .") (emphasis added). The inescapable implication of this holding – as even the dissent acknowledged – is that the analyst who wrote "those statements that are actually introduced into evidence" must testify at trial. 129 S. Ct. at 2545 (Kennedy, J., dissenting). Surrogate forensic testimony does not satisfy the Confrontation Clause.

2. Neither of the rationales that courts have offered for avoiding this straightforward conclusion withstands scrutiny.

The New Mexico Supreme Court's reasoning – to allow an analyst to testify who has not performed the actual test– "is little more than an invitation to return to [this Court's] overruled decision in [*Ohio v. Roberts,* 448 U.S. 56 (1980)]." *Melendez-Diaz,* 129 S. Ct. at 2536. But *Crawford* does not simply require an opportunity for

cross-examination of *someone* who can discuss, or even vouch for, the reliability of the testimonial evidence introduced. It requires the prosecution to make the declarant of testimonial evidence available for cross-examination, so the defendant can probe the reliability of the declarant's statements directly. *Crawford,* 541 U.S. at 61. Hence, as a leading treatise explains, "*Crawford*'s language simply does not permit cross-examination of a surrogate when the evidence in question is testimonial." D.H. KAYE ET AL., THE NEW WIGMORE: A TREATISE ON EVIDENCE-EXPERT EVIDENCE § 3.10.3, at 57 (Supp. 2009). This Court should not allow the New Mexico Supreme Court's decision to stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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